

R E S O L U T I O N

Resolution E-3816. This alternate resolution grants Southern California Edison Company's request for approval of one remaining power purchase agreement (PPA) which would contribute toward procurement of at least an additional one percent of the utility's annual electric sales from renewable energy resources irrespective of the utility's residual net short, in accordance with modified online date requirements. Consideration of this PPA had previously been deferred from Resolution E-3809 and is now addressed here.

By Advice Letter 1676-E Filed on December 24, 2002.

SUMMARY

Southern California Edison Company (SCE) filed Advice Letter (AL) 1676-E on December 24, 2002, requesting Commission approval of five power purchase agreements (PPAs) contributing toward procurement of at least an additional one percent of the utility's annual electricity sales from renewable energy resources¹ irrespective of the residual net short. Resolution E-3809 approved four of the five proposed PPAs, deferring consideration of the North American contract to a later meeting. We now consider and approve the North American contract, as modified, in this resolution, E-3816.

On May 8, 2003, the Commission issued D.03-05-035 which modified D.02-08-071 "to allow for a departure from the requirement that new renewable resources procured by the three respondent utilities through a set-aside during the transitional period process be required to come online and begin delivering electricity before the end of 2003, upon a showing of good cause." D.03-05-035 set forth criteria relevant to a showing of good cause determination which, we

¹ SCE refers to renewable energy resources as "eligible renewable resources" (ERRs).

determine, has been met by the proposed PPA.

We have wrestled with whether, and to what degree, to disclose information submitted to us under seal. It is incumbent upon this Commission to keep sensitive information confidential while still making plain to the public at large the bases for Commission decisions. In the final analysis, it is the Commission's responsibility to make decisions in the light of day, and we give that obligation great weight in determining whether commercial information is of such critical sensitivity as to override broader public concerns.

This resolution finds that certain material filed under seal pursuant to Public Utilities (Pub. Util.) Code Section 583 and General Order (G.O.) 66-C, and considered for possible disclosure, should be disclosed for the reasons discussed in the body of this resolution. Accordingly, all text in this resolution, except for specific pricing information which **[[[underlined in triple brackets]]]** (including PGC funding amounts), which appears in this light blue highlight in the unredacted electronic copy, in gray highlight in the unredacted hardcopy, or which is marked "[REDACTED]" in the redacted copy, should be made public upon Commission approval of this resolution. We wish to make clear that the decision we make here is based on the unique facts before us today, and we will adopt broadly applicable standards governing confidentiality elsewhere.²

This resolution discloses that the proposed PPA is with North American Trading and Marketing, Inc. (NATM), an affiliate of North American Power Group (NAPG), which involves the sale of output from a new biomass plant to be constructed at the site of the Kern Power Plant in Kern County currently owned by PG&E.³

Specifically, SCE would like the Commission to make the following four findings regarding the proposed PPA:

² Specifically, in R.01-10-024 (the "Procurement Rulemaking"), and also in A.03-02-002 (Pacific Gas and Electric Company's "ERRA Mechanism Application").

³ Under Pub. Util Code § 583, the Assigned Commissioner may choose to make public, during the course of a proceeding, data that a party has designated as confidential.

1. The PPA and SCE's entry into the PPA is reasonable and prudent for all purposes, including, but not limited to, recovery of all payments made pursuant to the PPA in rates, subject only to review with respect to the reasonableness of SCE's administration of the PPA.
2. SCE's solicitation of renewable power that resulted in the PPA has been conducted reasonably.
3. Any procurement pursuant to the PPA is deemed part of SCE's "baseline" quantity of eligible renewable resources for purposes of Section 399.15 of the Public Utilities Code or other applicable law.
4. Any procurement pursuant to the PPA is deemed transitional procurement by SCE from a renewable resource for purposes of determining SCE's compliance with any obligation that it may have pursuant to D.02-08-071 and D. 02-10-062, or other applicable law, to procure an additional 1% of its annual electricity sales from renewable resources.

This resolution makes the above findings with certain qualifications to the second, third, and fourth proposed findings.

SCE demonstrated that the bid solicitation was conducted in an open competitive manner and that the evaluation methodology used to select the power procurement contracts was reasonable for the purposes of this interim solicitation, although we order removal of contract termination clauses and PGC funding requirements from the PPA, and reiterate our position that Renewables Portfolio Standard (RPS) rules will be developed in due course.

SCE made a sufficient showing that the proposed PPA is in the ratepayers' interest because it further contributes toward SCE's obligation to procure renewable resources at a negligible premium relative to the provisional benchmark price provided in D.02-08-071.

AL 1676-E was submitted in compliance with Ordering Paragraphs 2, 3, 4, 5, and 6 of Decision (D.) 02-08-071, which: (1) allowed SCE to obtain California Department of Water Resources (DWR) credit support; (2) allowed SCE to use an expedited contract approval process set forth by the Commission; (3) required SCE to make advice letter filings for contract pre-approval within 30 days of contract signing or selection; (4) stated that the aforementioned requirements

also apply to renewable and Qualifying Facility (QF) procurement during the transitional process; and (5) required the respondent utilities, including SCE, to "procure at least one percent of their annual electricity sales through a set-aside competitive procurement process for renewable resources [in which] utilities must solicit bids with contract terms of five, ten, and fifteen years, and enter into contracts with a mixture of lengths of not less than five years." (D. 02-08-071, Ordering Paragraph 6)

The PPA, for which SCE is seeking approval, was solicited under SCE's September 28, 2002 "Request for Proposals [RFP] from Eligible Renewable Resources (ERRs) Suppliers" (Renewables RFP). Responses to the Renewables RFP were due on October 10, 2002.

DWR credit support is not required the counterparty to the PPA proposed by SCE.

As originally submitted, SCE AL 1676-E was protested by the Office of Ratepayer Advocates (ORA), the Utility Reform Network (TURN), the Coalition of California Utility Employees (CUE), the California Energy Commission (CEC), Ridgewood Olinda, LLC (Ridgewood), and California Wind Energy Association (CalWEA). SCE submitted a confidential response to the protests of ORA, TURN, CUE, CEC, Ridgewood, and CalWEA on January 9, 2003, under Public Utilities Code Section 583. On January 10, 2003, SCE submitted a revised confidential Appendix A to its January 9, 2003 response in order to correct several non-substantive typographical errors.

SCE requested that AL 1676-E be effective on January 30, 2003, pursuant to the Procurement Contract Review Process set forth in Appendix B of D.02-08-071, under the shortened notice authority under Section V. B. of General Order 96-A and Section 491 of the Public Utilities (PU) Code.

Although six parties filed protests to AL 1676-E, the proposed PPA was only contested by the Utility Reform Network (TURN), the Coalition of California Utility Employees (CUE), and the California Energy Commission (CEC). In contrast, the Office of Ratepayer Advocates (ORA) supported the approval of all five contracts submitted in AL 1676-E, including the proposed PPA. ORA also recommended that SCE sign an additional contract. Ridgewood, and CalWEA did not support or oppose any specific contracts, as these market participants did not have access to confidential, contract-specific material.

Several issues were raised by protestants regarding the NATM contract: (1) CUE contends that the NATM contract does not qualify for expedited review; (2) CUE asserts that the Commission should consider (in a non-expedited process) whether it would be better to have PG&E repower or redevelop the site, instead of selling to NATM to develop and sell power to SCE; (3) TURN and CUE contend that the NATM project would consume too much PGC funding; and (4) TURN contends that the proposed PGC funding conflicts with existing state law.

As noted and addressed in E-3809, some members of SCE's Procurement Review Group (PRG) protested SCE AL 1676-E over compliance with D.02-08-071, the bid solicitation process and evaluation criteria, whether ratepayer interest would be adequately served by the five contracts filed with the advice letter, and SCE's submission of AL 1676-E on December 24, 2002 which precluded Commission consideration of the request before the close of 2002.

This resolution approves the North American contract submitted in AL 1676-E, as modified, effective today.

BACKGROUND

On January 30, 2003, the Commission issued Resolution E-3809 which approved, in part, SCE's request to enter into certain renewable power purchase agreements. In AL 1676-E, SCE requested authority to enter into five power purchase agreements contributing toward procurement of at least an additional one percent of its annual electricity sales from renewable energy resources. Resolution E-3809 approved four of the five proposed PPAs, which would allow SCE to exceed the goal of adding an additional one percent of renewable energy sales to its existing portfolio.

The Background section in Resolution E-3809 applies here as well and is incorporated by reference.

The PPA for which SCE is now seeking approval was solicited under SCE's September 28, 2002 "Request for Proposals [RFP] from Eligible Renewable Resources (ERRs) Suppliers" (renewables RFP).

NOTICE

Notice of Advice Letter 1676-E was made by publication in the Commission's Daily Calendar. SCE states that a copy of the Advice Letter was mailed and distributed in accordance with Section III-G of General Order 96-A.

PROTESTS

D. 02-08-071 adopted an expedited schedule that requires a significantly reduced protest period. Protests were due within seven days of the advice letter filing and replies to protests were due within three days of the protest.

SCE's Advice Letter 1676-E was timely and confidentially protested on January 6, 2003 by ORA, TURN, CUE, and the CEC, and publicly protested by Ridgewood and CalWEA.

SCE submitted a confidential response to the protests of ORA, TURN, CUE, and the CEC on January 9, 2003, under Public Utilities Code Section 583. On January 10, 2003, SCE submitted a revised confidential Appendix A to its January 9, 2003 response in order to correct several non-substantive typographical errors.

Although six parties filed protests to AL 1676-E, the proposed PPA was only contested by the Utility Reform Network (TURN), the Coalition of California Utility Employees (CUE), and the California Energy Commission (CEC). In contrast, the Office of Ratepayer Advocates (ORA) supported the approval of all five contracts submitted in AL 1676-E, including the proposed PPA. Ridgewood, and CalWEA did not support or oppose any specific contracts, as these market participants did not have access to confidential, contract-specific material.

Several issues were raised by protestants regarding the NATM contract: (1) CUE contends that the NATM contract does not qualify for expedited review; (2) CUE asserts that the Commission should consider (in a non-expedited process) whether it would be better to have PG&E repower or redevelop the site, instead of selling to NATM to develop and sell power to SCE; (3) TURN and CUE contend that the NATM project would consume too much PGC funding; and (4) TURN contends that the proposed PGC funding conflicts with existing state law.

DISCUSSION

D.02-08-071 adopted a process to review and approve transitional period procurement contracts. It provided the utilities with an opportunity for an expedited resolution that resolves reasonableness issues, while ensuring effective Commission oversight, and a provisional benchmark of 5.37 cents per kWh was set forth in order to gauge the reasonableness of all contracts for which utilities seek approval. The utilities had the burden to show that the evaluation criteria used in the process were reasonable.

We examine SCE's request based on the directives set forth in D.02-08-071, as clarified in D.02-12-074, and generally with regard to the bid solicitation process and evaluation criteria, level of ratepayer benefit, timeliness, and PRG involvement. Prior to such examination, we disclose more details regarding the proposed contract.

Disclosure of North American Contract

The proposed PPA we approve today is between SCE and North American Power Group (NAPG), also known as North American Trading and Marketing (NATM), and involves the sale of output from a biomass plant to be constructed at the site of the Kern Power Plant in Kern County currently owned by PG&E. On July 30, 2001, the Governor issued Executive Order D-44-01, establishing certain conditions upon which PG&E could sell the Kern Power Plant to NAPG. One condition was that "the Kern Power Plant be transferred subject to the requirement that the North America Power Group enter into one or more contracts to sell power generated by the facility and ancillary services to the California Department of Water Resources or any other credit-worthy California entity for distribution to California ratepayers on a cost-of-service basis for a term of not less than five years."

Neither SCE nor NAPG has submitted to us any cost of service data concerning the Kern Power Plant, and approving the contract between NAPG and SCE should in no way be taken as a determination that the contract is a "cost-of-service" based contract for purposes of Executive Order D-44-01. Nor have we determined that any of the other conditions contained in the Executive Order have been satisfied. We anticipate taking up these questions, including whether the contract is on a "cost-of-service basis" for purposes of D-44-01, upon PG&E making an application under PU Code section 851 to transfer the Kern Power Plant to NAPG.

Bid Solicitation Process

In many respects, SCE has substantially complied with the directives set forth in D.02-08-071. SCE was required to "hold a separate competitive solicitation for renewable resources in the amount of at least an additional 1 percent of their annual electricity sold beginning January 1, 2003." The contract for which SCE is now seeking approval was solicited under SCE's Renewables RFP. Prior to the issuance of the renewables RFP, SCE circulated a notice of availability via electronic mail and facsimile to prospective participants⁴ inviting them to submit a Proposal Request Form. Responses to the renewables RFP were due on October 10, 2002.

In contrast to SCE's September 18, 2002 General (all-source) RFO for generation capacity, energy, and related products, SCE did not post the September 28, 2002 Renewables RFP on its website. SCE did not state why the Renewables RFP was not posted on its website, but SCE did post "Responses to Request for Proposal Inquiries" on its website and stated that "SCE is posting the frequently asked questions (FAQs) and responses ... as a means of providing those who have presented [renewable] proposals with equal access to information."⁵ SCE also posted a revised definition of eligible renewable resources (ERRs) on this same webpage.⁶

Contract Term Length and Related Provisions

⁴ The prospective participants included "approximately 500 individuals, representing nearly 300 separate independent power companies, trade associations, law firms, and energy consultants." (AL 1676-E, Appendix A, page 2 -- Filed as Confidential Material, Disclosed here by the Assigned Commissioner per Section 583)

⁵ SCE Renewables FAQs:
http://www.sce.com/sc3/005_regul_info/005i_qualifying_facilities/RFP_QandA.htm

⁶ SCE's revised definition of eligible renewable resources (ERRs) in its RFP:
http://www.sce.com/NR/rdonlyres/eujv6pasxnth4vy6uau4mieceu5fmn2df6hsr4legvw32yjuxqy47q422oidkaxujcfc3ulkl6c7qdv2qxc3e4zj7cd/QF_Protocol_Upd_20021001.pdf

D.02-08-071 required SCE to "solicit bids for electricity to be delivered beginning January 1, 2003, and extending for five, ten, and 15 year terms, with no contract shorter than five years." SCE complied with this requirement in Section V.(C)(2) of its RFP:

2. Contract Term

"Each proposal may specify up to three proposed contract terms, which must be 5, 10, or 15 years. If more than one proposed contract term is specified, then the proposal must specify the pricing terms that will apply to each term. The commencement of the contract term shall be as specified in the SCE Agreement or the CDWR Agreement, as applicable." (Filed as Confidential Material)

Several protestants took issue with this approach, including the CEC:

"SCE restricted price bidding in the RFO. SCE's RFO did not allow a bidder to propose a fixed price for a 15-year term, and discouraged bidders from proposing a fixed price for a 10-year term if their project was an existing project. SCE also did not allow projects to propose variable energy prices that were different from SCE's methodology in the RFO." (CEC Protest, page 6). (Filed as Confidential Material)

TURN notes that SCE placed further pricing restrictions on each contract term in RFP "Section V.(C)(4) Levelized Energy Price (Minimum 5 Year Duration)" which includes the following:

"Participants may not proposed a Fixed Energy Price for a term longer than 10 years (even if they proposed a 15-year contract term). Proposals specifying a Fixed Energy Price for a term longer than 10 years are subject to disqualification in SCE's sole discretion." (Filed as Confidential Material, Disclosed here by the Assigned Commissioner per Section 583)

TURN contends that these additional pricing conditions contributed to a more complex RFP and led to higher bid prices.

"TURN submits that SCE's prohibition on 15-year fixed prices ... demonstrates bad faith and led to higher bid prices. Furthermore, this limitation runs counter to the Commission order directing that utilities offer renewable contracts of up to 15 years in length. Taken together, these actions provide additional support for a finding that SCE is in contempt of

the Commission's interim procurement decisions." (TURN Protest, page 15) (Filed as Confidential Material)

We agree that these additional pricing provisions made SCE's Renewables RFP more complex, but though these provisions could have contributed to higher prices, all participants were subject to the same requirements and it has not been shown that these provisions were discriminatory toward any participant or technology. Thus, these pricing provisions are in compliance.

2003 Online Requirement

D.02-08-071 required that "any contracts for new renewables projects ... come online and begin delivering electricity before the end of 2003" (page 33). In its protest to SCE AL 1676-E, CUE contended that the NATM contract does not qualify for expedited review because it cannot possibly meet the 2003 year-end online requirement.⁷ However, on May 8, 2003, the Commission issued D.03-05-035 which modified D.02-05-071 "to allow for a departure from the requirement that new renewable resources procured by the three respondent utilities through a set-aside during the transitional period process be required to come online and begin delivering electricity before the end of 2003, upon a showing of good cause" (D.03-05-035, page 1). The modifying decision set forth the following criteria relevant to a showing of good cause determination:

- a. "The proposed PPA is the result of an open and competitive bid solicitation that notified all bidders that proposals would be considered for renewable energy projects that did not meet the 2003 online requirement set forth in D.02-08-071."
- b. "The proposed PPA must contain reasonable prices and terms, provide for reliable renewable power, and not displace any comparable bidders."

⁷ "Even if PG&E filed an application under Section 851 to approve sale of the Kern Power Plant to NAPG, and all of the requirements [of D.02-08-071 and Executive Order D-44-1] were satisfied (which they are not), NATM could not "come online and begin delivering electricity before the end of 2003." There simply is not time for NATM to obtain all of the required regulatory approvals and then construct the plant." (CUE Protest to AL 1676-E, pages 3-4)

- c. "A factor in the failure of the PPA to meet the 2003 online date is that Commission action or inaction had a role in delaying the project."
(D.03-05-035, page 4)

D.03-05-035 stated at page 4 that "[w]hether or not good cause has been shown to depart from the 2003 online date, and what online date should be imposed in lieu of the 2003 online date, will be a fact-specific determination for the Commission to make in connection with a particular PPA."

The proposed PPA meets the three criteria relevant to a good cause determination set forth in D.03-05-035.

- a. First, in E-3809 (Finding 10), we found that SCE's renewables solicitation was reasonable: "SCE's solicitation of renewable power that resulted in the PPAs [submitted in SCE AL 1676-E] has been conducted reasonably for purposes of this interim procurement...." In its bid protocol, SCE allowed for the consideration of bids that did not meet the 2003 online requirement set forth in D.02-08-071.
- b. Second, as discussed in the "Reasonableness Benchmark and PGC Funding Contingencies" section of this resolution, the proposed PPA does contain reasonable prices and terms, provides for reliable renewable power, and does not displace any comparable bidders.
- c. Third, Commission action or inaction did play a role in delaying the project. The sale of the Kern Facility from PG&E to North American Power Group (NAPG) must occur in order to allow NAPG's affiliate, NATM, to contract with SCE for the sale of power to SCE from the Kern Facility. PG&E and NAPG have previously sought Commission approval on this point, but have been delayed and denied such approval. In addition, the Commission has held the proposed PPA submitted in SCE AL 1676-E for further review and consideration. This action has further contributed to NAPG's anticipated failure to meet a 2003 online date.

Proposed Sale of the Kern Facility

On October 2, 2001, the Commission issued D.01-10-002 which, among other things, denied rehearing of D.01-04-004, preventing the sale of the Kern Facility from PG&E to North American Power Group (NAPG). North American Trading

and Marketing (NATM) , an affiliate of NAPG, now seeks to advance its efforts to develop the Kern Facility site by entering into a contract with SCE, the subject of this alternate resolution to E-3816. According to D.01-04-004, "the Commission found that Public Utilities Code Section 377 precluded the sale [of the Kern Facility to NAPG in 2001 because] ... PG&E failed to meet its burden of proof to show that the sale was in the public interest under Public Utilities Code Section 851." D.01-10-002 provides an overview of the events leading up to that point:

"On May 15, 2000, PG&E filed an application for authority to establish a market value for its Kern Facility..., located in Bakersfield, California, [which] was the site of a power plant ... built between 1948-1950. The Kern Facility was used to generate electricity until 1985, when [PG&E] placed the plant in cold stand-by due to the availability of less expensive sources of energy. The plant was in cold stand-by until 1994 when certain assets were removed from PG&E's books and the plant was removed from the ratebase. All operational permits associated with the plant [had] expired.

"On December 13, 2000, PG&E filed a Supplemental Application ... pursuant to Public Utilities Code Sections 367(b) and 851 for the following purposes: 1) To certify that PG&E followed the auction process described in the original application filed May 15, 2000; 2) to identify the winning bidder as North American Power Group, Ltd. (NAPG); 3) to provide the Commission with cost, value and accounting information to properly reflect the sale; and 4) to request a final Commission order approving the sale, and approving the proposed ratemaking and accounting treatment of the sale, and a finding that Public Utilities Code Section 363 does not apply to the sale.

"While PG&E's application was pending, Assembly Bill 6 (ABX1 6) was passed by the Legislature in the First Extraordinary Session and signed into law by the Governor on January 18, 2001 as an urgent matter to take effect immediately. A portion of the bill amended Public Utilities Code Section 377 to prohibit divestiture prior to January 1, 2006 of any "facility for the generation of electricity owned by a public utility" and stated that "[t]he Commission shall ensure that public utility generation assets remain dedicated to service for the benefit of California ratepayers."

".... On April 3, 2001, we issued Decision (D.) 01-04-004, which did not permit PG&E to divest the Kern Facility, on the ground that such

divestiture by PG&E was prohibited by ABX1 6. Since we found that there was a need to restart the Kern Facility due to a shortage of generation capacity made available to PG&E during the summer of 2001, and the need to improve California's generating capacity during this critical period, we further ordered PG&E to restart the Kern Facility and set a target date of June, 2001 for restoring the plant to operational status. In the decision, we also acknowledged that "it may be very difficult for PG&E acting alone to restore the plant to operational status," and suggested that PG&E might contract with NAPG to restore, and possibly operate, the plant for PG&E under contract.

".... On July 31, 2001, Governor Davis signed Executive Order D-44-01. The Executive Order state[d] that Public Utilities Code Section 377 was "not intended to apply to non-operational facilities" and suspends Section 377 to the extent that it prohibits PG&E from transferring the Kern Facility to NAPG for "reactivation and renewed operation." As a condition of transfer, the Executive Order requires NAPG to "enter into one or more contracts to sell power generated by the facility and ancillary services to the California Department of Water Resources or any other credit-worthy California entity for distribution to California rate-payers on a cost-of-service basis for a term of not less than five years." The Executive Order also states that any Commission order or decision prohibiting or restricting PG&E from transferring the Kern Facility to NAPG is suspended to the extent necessary to effectuate the transfer, but the Commission "shall retain all other jurisdiction over the transfer."

Section 851 Review and Cost-of-Service Showing

A new Section 851 review will allow the Commission to consider issues not addressed here. A Section 851 review will also address CUE's concern as to whether it would be better to have PG&E repower or redevelop the Kern Power Plant, instead of selling it to NATM in order for NATM to develop the site and sell power to SCE.

Neither SCE nor NAPG have submitted to us any cost of service data concerning the Kern Power Plant, and approving the contract between NAPG's affiliate and SCE should in no way be taken as a determination that the contract is a "cost-of-service" based contract for purposes of Executive Order D-44-01, nor as a determination that any of the other requirements of the Executive Order have

been satisfied. NAPG can submit such cost-of-service filings in an upcoming Section 851 proceeding, at which point we will examine those in detail.

Contracts for a Mixture of Term Lengths

D.02-08-071 required SCE to "enter into contracts with a mixture of term lengths." SCE has complied with this requirement. We disclose here that the proposed PPA has a 15-year contract term.

Preference for Existing Renewable Resources

D.02-08-071 required SCE to give "preference to existing renewable resources in the bidding process if their bids are equal to or lower than prices offered by new projects." On pages 7-8 of Confidential Appendix A to AL 1676-E, SCE notes that:

SCE "gave greater weight to bidders with projects that were presently in operation to comply with the [D.02-07-071] requirement that IOUs prefer existing resources, and in recognition of the fact that existing resources are most likely to be able to lower their price due to the 'sunk' nature of their capital cost."

SCE's RFO contained a similar statement noting SCE's preference for existing projects. (See Section III. B., Page 5 of SCE RFP Protocols)

Although the proposed PPA would be a new project, the results of SCE's solicitation, previously considered in E-3809, did demonstrate a preference for operating resources.

Compliance with the One Percent Requirement

D.02-08-071 stated that the "requirement for a 1 percent increase in renewable resources is irrespective of the residual net short, though we encourage the utilities to solicit bids from innovative renewables projects that can help meet the utilities' residual net short requirements." The Commission has recently assigned a significant number of DWR contracts to SCE which created the concept of a utility's residual net short.⁸ We disclose here that the proposed PPA

⁸ The assignment of DWR contracts to SCE, and other IOUs, spawned the term "residual net short," which refers to a utility's open position relative to its system load.

would contribute an additional one-half percent, annually, to SCE's existing portfolio of electricity generated from renewable resources. In addition, SCE has already complied with this requirement in that the four contracts already approved in E-3809 exceed the one percent goal.

Transitional Procurement and Baseline Confirmation Issues

SCE requested the following two findings in AL 1676-E:

"Any procurement pursuant to the PPA is deemed part of SCE's "baseline" quantity of eligible renewable resources for purposes of Section 399.15 of the Public Utilities Code or other applicable law." (SCE AL 1676-E, page 3)

"Any procurement pursuant to the PPA is deemed transitional procurement by SCE from a renewable resource for purposes of determining SCE's compliance with any obligation that it may have pursuant to D.02-08-071 and D. 02-10-062, or other applicable law, to procure an additional 1% of its annual electricity sales from renewable resources." (SCE AL 1676-E, page 4)

In approving the proposed PPA as amended, we confirm that procurement pursuant to the PPA will be deemed part of SCE's baseline, and will be counted toward SCE's one percent purchase requirement under D.02-08-071 and D.02-10-062.

Public Goods Charge (PGC) Funds Issues and Termination Clauses

D.02-08-071 required "that bids to provide renewable power clearly identify any expected funds from the public goods charge (PGC) administered by the CEC that are included in the resource pricing." SCE went well beyond this requirement and included contract termination clauses in the proposed PPA predicated on obtaining a certain level of PGC funding.

The other two utilities (Pacific Gas & Electric and San Diego Gas & Electric) did not utilize PGC funding-contingent contract clauses. This contract language was

An IOU's "net short" is simply its System Load, less its Utility Retained Generation (URG). Residual net short is simply System Load, less URG, less DWR contracts.

not set forth in the Renewables RFP, nor was it part of the standard contract boilerplate. It appears that this language was formulated during contract negotiations. The use of such clauses was not envisioned by this Commission. As we did in E-3809, we again conclude that the use of these PGC funding-contingent contract clauses are not consistent with the D.02-08-071 requirement that "utilities ... solicit bids for electricity to be delivered beginning January 1, 2003, and extending for five, ten, and 15 year terms, with no contract shorter than five years" for the reason that the use of such clauses could result in contracts shorter than five years which is inconsistent with our directives on this point. Accordingly, we direct SCE to remove the contract termination clauses from the proposed PPA that tie contract termination rights to PGC funding. In addition, we direct SCE to remove the PGC funding requirements from the proposed PPA, in order to allow the CEC to make a more objective PGC funding determination.

However, even without the desired PGC funding, the proposed PPA would require a negligible premium relative to the provisional benchmark price provided in D.02-08-071 which is discussed in the following section.

Reasonableness Benchmark and PGC Funding Contingencies

In D.02-08-071, we set forth a provisional benchmark of 5.37cents/kWh in an attempt to establish an acceptable level for *per se* reasonableness. However, the ORA protest to the previous advice letter filing (AL 1676-E) correctly noted that, "D.02-08-071 did not specify whether the benchmark price was in nominal or constant dollars" (ORA Protest to SCE AL 1676-E, page 2). Notwithstanding that point, without PGC funding, the proposed PPA is within an acceptable range of the provisional benchmark, as required by SCE's Renewables RFP and D.02-08-071. Thus, the PPA and SCE's entry into the PPA are reasonable and prudent for all purposes, including, but not limited to, recovery of all payments made pursuant to the PPA in rates, subject only to review with respect to the reasonableness of SCE's administration of the PPA.

It should be noted that there is considerable uncertainty as to whether the proposed PGC funding levels⁹ would require statutory change and could

⁹ Proposed PGC funding of [[[Pricing Information Redacted]]] represents a cumulative award for two 49.9 MW NATM units, as calculated by TURN in its protest to AL 1676-E at page 8.

actually materialize. With regard to the latter point, TURN makes the following assertions in its protest to the advice letter:

"All but one of the required PGC awards cannot be issued as contained in the contracts due to conflicts with existing state law. While SCE requires that the NATM projects obtain awards for the duration of the contracts (15 years), the CEC is statutorily prohibited from making awards for greater than 10 years under the language of §383.5(d)(2)(iii). When this concern was raised on the December 4 call, SCE staff (who seemed unaware of the statutory limit) first suggested that the law could be changed. As an alternative, SCE proposed increasing payments over the first 10 years to provide total funding equivalent to the anticipated 15 year award. The preceding chart incorporates this assumption. As explained in the CUE protest, there are also concerns over whether the NATM project is likely to be online anytime prior to 2006.¹⁰ This means that up to **[[[Pricing Information Redacted]]]** in public goods funds could be held in reserve for the next three years for a project that may never come online." (TURN Protest to SCE AL 1676-E, page 8)

If we grant SCE's request as proposed, we might put undue pressure on the Legislature, the Governor, and the CEC to revise statutes and regulations to comport with the proposed PGC funding and to grant such funding beyond currently authorized levels. Accordingly, we will approve the NATM contract without the proposed PGC funding and allow it to proceed to a Section 851 proceeding. Concurrently, SCE or NATM can, of course, file with the CEC for a determination regarding appropriate PGC funding levels for the NATM projects, if any.

It should be noted that we do not establish a routine practice or new methodology in this resolution, as the approval of this contract is not indicative of approval of any contracts to be submitted in the future.

Sanctions Issue

¹⁰ Hurdles facing the NATM project include a requirement that output be sold at "cost based rates" and the need to obtain site control which requires Commission approval for PG&E to transfer the site pursuant to §851 and §377.

TURN and the CEC renewed their requests that the Commission find SCE in contempt of D.02-08-071 and D.02-10-062 pursuant to Section 2113 of the PU Code. Resolution E-3809 addressed this issue in some detail, and we continue to defer consideration of sanctions for SCE's non-compliance with the above referenced decisions.

Procurement Review Group (PRG) Involvement

D.02-08-071 required SCE, PG&E, and SDG&E to establish a Procurement Review Group (PRG) in order to ensure that interim procurement contracts entered into by the utilities are subject to sufficient and expedited review and pre-approval. The PUC Energy Division and ORA staff would be ex officio members of each PRG, and membership of the PRG would be open to an appropriate number of interested parties who are not "market participants."

PRG members have the right to consult with and review the details of: (1) each utility's overall interim procurement strategy; (2) proposed procurement contracts with the utilities before any of the contracts are submitted to the PUC for expedited review; and (3) proposed procurement processes including but not limited to RFPs, which result in contracts being entered into in compliance with the terms of the RFP.

From September 2002 through December 2002, SCE sponsored two face-to-face PRG meetings¹¹ in San Francisco and arranged three telephone conferences¹² concerning SCE's renewable solicitation. In a meeting on September 16, SCE reviewed its draft RFO documents with its PRG. SCE received feedback on the draft documents during a September 19 conference call, and took it into account before finalizing and issuing the RFO to potential renewable bidders on September 28. At this meeting, the PRG concurred that SCE should accept bids from projects with on-line dates after December 31, 2003, but that SCE should prefer those resources, if possible, that came on-line as soon as possible. SCE concurrently provided a copy of the final RFP to each of its PRG members. At the November 8 PRG meeting, SCE reviewed the status of its solicitation by

¹¹ These meetings took place at the Hyatt Regency Hotel in San Francisco on September 16 and November 8, 2002.

¹² The phone conferences were held on September 19, November 14, and December 4, 2002.

providing preliminary results and substantial detail regarding the progress of negotiations with “short listed” bidders.

During the November 14 PRG conference call, SCE again discussed the progress of the negotiating and contracting process. On December 4, SCE provided the PRG with near-final versions of “term sheets” that provided substantial detail regarding proposed contract terms with the bidders who were being selected from SCE’s “short list.” During a PRG conference call that same day, SCE reviewed the term sheets and SCE’s intent to file shortly an advice letter requesting Commission approval of finalized contracts based on the material terms reflected in the term sheets.

ORA, TURN, CEC, NRDC, DWR, CUE, and the Commission's Energy Division actively participated in this PRG process.

Disclosure of Confidential Material¹³

We have wrestled with whether, and to what degree, to disclose information submitted to us under seal. It is incumbent upon this Commission to simultaneously keep sensitive information confidential while still making plain to the public at large the bases for Commission decisions. In the final analysis, it is the Commission’s responsibility to make decisions in the light of day, and we give that obligation great weight in determining whether commercial information is of such critical sensitivity as to override broader public concerns.

SCE is the sole proponent of keeping the redacted material confidential, and so we devote the bulk of our discussion to addressing SCE’s concerns. We quote at length from SCE’s first set of comments on draft resolution E-3814 (which we think apply equally well here to E-3816) regarding confidentiality, and address SCE’s comments in some detail. As we noted at the outset of this resolution, the government of this state is generally supposed to be conducted in the sunshine. There are, of course, exceptions to this general rule, and so we face a balance between keeping confidential that which, if released, would harm ratepayers,

¹³ The " Disclosure of Confidential Material" discussion section was essentially taken from draft resolution E-3814 which addresses SCE AL 1680-E. We believe that SCE's comments regarding the disclosure of confidential material in response to draft resolution E-3814 apply equally well to draft resolution E-3816 with regard to the proposed PPA as filed in SCE AL 1676-E.

while making clear to the public at large what we are doing, and why we are doing it. With that backdrop, we turn to the questions at hand: whether to release redacted information to the public, and, if so, what redacted information to make public.

SCE points out, correctly, in its comments on draft resolution E-3814 that:

"The Commission, in issuing the Protective Order, recognized that information related to the solicitation and to particular contract negotiations, is highly sensitive and that the public release of such information would hinder the ability of SCE and the other utilities to negotiate the best possible contractual terms for the benefit of its ratepayers. SCE has, as you know circulated confidential solicitation, negotiation and contract-related materials to SCE's PRG, which has vigorously advocated the interests of the renewable community."

Certainly, the Commission did, and does, recognize that much confidential information would be exchanged within the PRG. But this is in no way dispositive of the question of whether the particular information that is proposed for release in this resolution is so commercially sensitive as to warrant it remaining confidential. Thus, while we agree with the generalized assertion that SCE propounds, we find that we must look deeper.

The redacted information in this resolution can be fairly lumped into just a few categories:

1. Discussion of PGC funding
2. Proposed Contract terms (e.g., name of counterparty, pricing, duration, volumes)
3. The relative merits of the proposed contract vis. competing offers
4. RFP terms.

SCE asserts that the Commission must make particularized findings of fact supporting a decision to disclose the redacted information. We disagree, and share the sentiment, expressed by TURN/NRDC, that: "[t]he Commission need not devote pages of the resolution to a lengthy debate over the benefits of public disclosure. It is sufficient simply to include the finding that disclosure is warranted." Nonetheless, in view of the peculiar circumstances surrounding this PPA, and the vacillation in which Energy Division has engaged with respect to disclosure issue, we believe some elaboration is warranted regarding why we choose the course we do. At the outset, we reiterate the basic ground rules

concerning § 583, as articulated repeatedly in resolutions that the Commission has issued in response to Public Records Act requests seeking material submitted under § 583. PU Code Section 583:

" . . . assures that staff will not disclose information received from regulated utilities unless that disclosure is in the context of a Commission proceeding or is otherwise ordered by the Commission." (*Re Southern California Edison Company (Edison)* [Decision (D.) 91-12-019] (1991) 42 Cal.P.U.C.2d 298, 300.) Section 583 neither creates a privilege of nondisclosure for a utility, nor designates any specific types of documents as confidential. (*Id.*, 42 Cal.P.U.C.2d at 301.) As we noted in *Edison*, supra:

The Commission has broad discretion under Section 583 to disclose information. See, for instance, Southern California Edison Company v. Westinghouse Electric Company, 892 F.2d 778 (1989) in which the United States Court of Appeals for the Ninth District stated (at p. 783):

On its face, Section 583 does not forbid the disclosure of any information furnished to the CPUC by utilities. Rather, the statute provides that such information will be open to the public if the commission so orders, and the commission's authority to issue such orders is unrestricted.¹⁴

In Resolution L-290, we go on to explain that:

The legal test for state agency disclosure of public records is set forth in the California Public Records Act (PRA) (Government Code Section 6250 et seq.). The PRA is intended to provide "access to information concerning the conduct of the people's business," while being "mindful of the rights of individuals to privacy." (Government Code Section 6250.) PRA exemptions of certain classes of records from public disclosure must be narrowly construed to ensure maximum disclosure of government operations. (New York

¹⁴ Resolution No. L-290, California Public Utilities Commission, 2000 Cal. PUC LEXIS 1087, June 22, 2000.

Times v. Superior Court (1990) 218 Cal.App.3d 1579, 1585.) The PRA requires that the public be given access to government records unless they are specifically exempt from disclosure, or the public interest in nondisclosure clearly outweighs the public interest in disclosure. (Government Code Section 6255.) The listing of a record among the specific exemptions in the PRA does not prohibit the release of the records. We have long recognized that PRA exemptions are permissive, not mandatory; "they permit nondisclosure but do not prohibit disclosure." (Re San Diego Gas & Electric Company (SDG&E) (1993) 49 Cal.P.U.C.2d 241, 242, citing Black Panther Party v. Kehoe (1974) 42 Cal.App.3d 645, 655.) The general policy of the PRA clearly favors disclosure. Unless there is a showing that the public interest in confidentiality clearly outweighs the public interest in disclosure, we will generally release records upon request.¹⁵

It is, in short, within this Commission's sole discretion to determine whether to release or keep confidential information submitted pursuant to § 583. And there is a presumption in favor of release upon request.

SCE questions whether there is a public interest in disclosure:

"SCE is at a loss to know what the public interest could be in this case. SCE notes that the Draft Resolution proposes to find that the PPA is not reasonable and to reject the proposed findings. SCE disputes the resolution on the merits, as indicated in its comments filed yesterday. Even if the Commission were inclined to approve the PPA, SCE would not understand the basis for publicly releasing confidential information regarding SCE's solicitation or its contract terms and would oppose any such release. However, SCE is particularly puzzled as to why, in the context of a rejection, the Commission needs to publicly reveal any confidential information. To the extent that the Commission wishes to send a message that it views certain proposed contract terms to be inappropriate, for example, PGC funding terms, any such message is more than adequately sent by revelation to SCE and the PRG of the

¹⁵ Resolution L-290, above.

Commission's decision concerning such terms. SCE can fathom no reason for publicly discussing such terms, and subjecting SCE and its ratepayers to the disadvantage of having its confidential solicitation materials and materials related to its confidential negotiations publicly revealed."

We agree with SCE (indeed, with *all* commenters) that it is not in consumers' interest to see confidential utility information concerning procurement disbursed haphazardly, and it is certainly *contrary* to consumer interests to see the procurement process made too transparent to suppliers, who might use certain information to game that process to their pecuniary advantage.

We choose to release non-price hitherto confidential information today because we see a significant public benefit attached to making public our ruling on the PPA. It is important for both the public at large, and the generation community in particular, to understand our ruling on the proposed PPA.

In its March 10, 2003 comments on this resolution and on a related draft resolution (E-3814), SCE expresses concern that we would "reveal information about the proposed price of ..." ¹⁶ the PPA in SCE AL 1680-E. After careful consideration of possible price disclosure, we opt not to disclose pricing information in this expedited process. We note and concur with SCE that: "the mere public communication" ¹⁷ of our determination and associated discussion, accompanied by some disclosure is sufficient" at this time.

We also acknowledge SCE's concern over a "potential chilling effect [] disclosure ... [may] have on future solicitations as renewable generators and utilities alike question the sorts of confidential information that will be revealed, notwithstanding ... clear Commission [direction on this point] . . ." ¹⁸ The concern seems to be that potential bidders will avoid processes where their bid information might be disclosed. We restate here that we are not with this resolution setting forth a general policy regarding disclosure of procurement-related information that one or another party has designated as confidential.

¹⁶ SCE March 10, 2003 Comments, p. 4, n. 6.

¹⁷ Id., p. 5.

¹⁸ Id.

More general policies regarding the scope of confidentiality are being established elsewhere.

As discussed above, we start from the premise that government should be conducted in the sunshine. By releasing to the public redacted information, we assure the public that their interests are being protected through disclosure of selected confidential material. By opening a small window into the PRG process, we assure generators that they will be treated fairly in a procurement process. Finally, we make potential participants in the PGC process who are not PRG members aware that we are taking steps now to avoid prejudicing the PGC funding process, something they could not have known before now was a possible concern. These ends cannot be served by disclosure to SCE and the PRG alone.

We take comfort in the fact that TURN, one of the most active consumer groups in the PRG process on this issue, does not believe that making public the heretofore redacted material in this resolution will adversely affect consumers. As TURN/NRDC state in their second set of comments: “The disclosure of these debates would could not possibly undermine SCE’s future ability to receive competitive bids from, or effectively negotiate future contracts with, renewable power suppliers.”¹⁹ We are exquisitely sensitive to the possibility of giving market participants data that they could use to game procurement processes. We are quite confident that nothing we make public here, whether viewed alone or in connection with information we have disclosed elsewhere, will materially facilitate gaming.

Certainly information about the RFP should be made public. The RFP was widely disseminated to the generation community, so those who stand to benefit most from what SCE characterizes as disclosure of the contents of “confidential solicitation materials” already know the RFP’s content.

In summary PRG members have requested that we disclose the redacted information in this resolution. We find that the public interest in non-price disclosure is not outweighed by the public interest in confidentiality.

¹⁹ TURN/NRDC February 24, 2003 Comments, p. 3.

Disclosure and Draft Resolutions

We turn now to the final portion of SCE's comments. SCE was concerned about Draft Resolutions with redacted information being made public prior to a Commission vote, and implicitly sought assurance that there would be no disclosure prior to a vote:

"SCE further understands that, without a formal Commission finding, no confidential information will be publicly revealed, and therefore any confidential materials will be redacted from any public version of the Draft Resolution, at least before such resolution is voted out by the Commission.

SCE is correct that no release of material submitted under § 583 may take place absent action of the Commission or a Commissioner. The redacted material contained herein was not released until the Commission voted to release it.

SCE concluded that:

in the event the Commission determines to make a finding, over SCE's objection, that confidential information may be released, such release should only take place upon expiration of the time for filing applications for rehearing of the Resolution. SCE notes that it only learned for the first time last Friday [February 7, 2003] of the Commission's possible intention to waive confidentiality protection as to materials related to its solicitation and the PPA, and respectfully requests a full opportunity to brief the Commission on the significant negative impact that would attend public release of these sensitive materials.

We decline to adopt SCE's proposal. By the time that we vote this resolution out, there will have been three rounds of comments, two rounds on versions of the resolution calling for complete disclosure of confidential information. SCE will have had ample opportunity to address confidentiality issues. We are certainly cognizant of the impossibility of "unringing the bell" and making again confidential that which has been publicly disclosed. Nonetheless, we feel that it is sufficiently clear that it is in the public interest to release the information disclosed by this resolution that no further briefing is necessary.

Therefore, this resolution finds that certain material filed under seal pursuant to Pub. Util. Code Section 583 and General Order (G.O.) 66-C, and considered for possible disclosure, will be made public. Accordingly, all text in this resolution,

except for specific pricing information which **[[[underlined in triple brackets]]]** (including PGC funding amounts), which appears in this light blue highlight in the unredacted electronic copy, in gray highlight in the unredacted hardcopy, or which is marked "[REDACTED]" in the redacted copy, should be made public upon Commission approval of this resolution.

COMMENTS

PU Code section 311(g)(1) provides that this resolution must be served on all parties and subject to at least 30 days public review and comment prior to a vote of the Commission.

Energy Division requests that the 30-day comment period for this resolution be reduced to four days: (1) because of the expedited schedule set forth in D.02-08-071; and (2) because SCE's Procurement Review Group has been active throughout the interim procurement process leading up to the advice letter and resolution, and, hence, no comments would alter our response to their protests.

Comment Period on Draft Resolution E-3809

Although now the subject of E-3816, the proposed PPA was considered in draft Resolution E-3809 at the Commission's February 23, 2003 meeting (Agenda 3108, Item E-4 2/27/2003). At that meeting, Commissioner Wood sponsored an amendment to Item E-4 to defer consideration of the proposed PPA to a subsequent meeting. Item E-4 (E-3809) was approved with the Wood amendment.

On January 28, 2003, draft resolution E-3809 was circulated to exclusively to the PRG via email by the Energy Division at 1:34 PM for a confidential one-day comment period. Comments were due back via email to the Energy Division by 2:00 PM on Wednesday, January 29, 2003. Draft resolution E-3809 contained confidential material protected by the Non-Disclosure Agreement for SCE's PRG, and by Section 583 of the Public Utilities Code. Comments were filed by ORA, TURN, NRDC, CUE, CEC, and SCE. Minor, clarifying revisions were made to the draft resolution in response to comments.

Comment Periods on Draft Resolution E-3816 and Alternates

On Friday, March 7, 2003 at about 4:00 PM, the draft resolution prepared by the Energy Division (Agenda Item ID 1771) was circulated exclusively to the PRG by

the Energy Division via email for a confidential three-day comment period. Originally, comments were due back via email to the Energy Division by 3:00 PM on Monday March 10, 2003 but was extended to Tuesday March 11, 2003 at 9:00 AM.

Also on Friday, March 7, 2003 at about 5:00 PM, a draft resolution (Wood Alternate, Agenda Item ID 1844) was circulated exclusively to the PRG by the Energy Division via email for a confidential comment period of three calendar days. Comments were due via email to the Energy Division by 9:00 AM on Tuesday, March 11, 2003. Comments were filed by ORA, CEC, CUE, and SCE. These comments are discussed in detail below in the "Discussion of Comments Received From March 7th Comment Period" section of this resolution.

The draft resolutions that were circulated contained confidential material protected by the Non-Disclosure Agreement for SCE's PRG, and by Section 583 of the Pub. Util. Code. Energy Division received comments from ORA, CEC, and SCE supporting Agenda Item ID 1771 with modifications, while CUE commented in support of the Wood Alternate, Agenda Item ID 1844.

The first draft Kennedy Alternate (Agenda Item ID 2045) was circulated for comment on Monday, April 7, 2003 at about 5:00 PM for an approximately seven-day comment period. A public, redacted copy was circulated to the Rulemaking (R.) 01-10-024 service list, while a confidential, unredacted copy was circulated to the SCE PRG. Comments were due back via email to the Energy Division by 9:00 AM on Monday April 14, 2003. Each distribution was advised that this is an ample comment period and we see no reason to grant any requested extensions. Comments were filed by TURN, ORA, CUE, and SCE. These comments are discussed in detail below in the "Discussion of Comments Received From April 7th Comment Period" section of this resolution.

The second draft Kennedy Alternate (Agenda Item ID 2163) was circulated for comment on Wednesday, April 30, 2003 at about 3:30 PM for an approximately four-day comment period. A public, redacted copy was circulated to the Rulemaking (R.) 01-10-024 service list, while a confidential, unredacted copy was circulated to the SCE PRG. Comments were due back via email to the Energy Division by 9:00 AM on Monday May 5, 2003. Each distribution was advised that this was an ample comment period and that no extensions would be granted, and none were received. Comments were filed by TURN and SCE. These comments are discussed in detail below in the "Discussion of Comments Received From April 30th Comment Period" section of this resolution.

Discussion of Comments Received From March 7th Comment Period

On Friday, March 7, 2003, both the draft resolution prepared by the Energy Division (Agenda Item ID 1771) and a draft alternate resolution (Wood Alternate, Agenda Item ID 1844) were circulated exclusively to the PRG by the Energy Division via email for a confidential three-day comment period. Originally, comments were due back via email to the Energy Division by 3:00 PM on Monday March 10, 2003 but was extended to Tuesday March 11, 2003 at 9:00 AM. Comments were filed by ORA, CEC, CUE, and SCE.

The issue of central concern to the commenters is the 2003 online requirement. CUE is supportive of both the draft and the alternate with regard to the use of a termination clause designed to ensure a 2003 online date,²⁰ although CUE supports the alternate that rejects the proposed contract. ORA supports the draft but suggests that the 2003 online requirement be "eliminated or changed to a later date." The CEC stated that "the Commission should relax this [2003] online requirement." SCE contends that the 2003 online requirement should be "eliminated" because DWR credit support is not a component of the proposed PPA. For more information regarding this requirement, see the "2003 Online Requirement" Discussion subsection of this resolution.

With regard to the specifics of the proposed PPA, this deal is for a **[[[Pricing Information Redacted]]]** reasonable price, **[[[Pricing Information Redacted]]]** reasonableness benchmark, and provides for a substantial quantity (up to 100 MW) of reliable renewable power. The contract originally provided for a condition of PGC funding but Edison is willing to drop this condition. Thus, no PGC funds are required. Both the draft resolution and the alternate resolution acknowledge that the price and other contract terms are reasonable, and resulted from an open and competitive solicitation. This deal did not displace any comparable bidders. The next bidder in the stack offered a significantly higher price and nowhere near the quantity of power.

²⁰ As mentioned earlier, the purpose of this termination clause is to assure compliance with D.02-08-071 (be online in 2003), in contrast to the SCE termination clauses that are tied to PGC funding. The SCE termination clauses would put undue pressure on the CEC and potentially put the PPA in conflict with our own multi-year (5, 10, 15-year) contract term provision in D.02-08-071.

Passing on this deal now, and leaving it to a later solicitation would not be prudent. There is not likely to be another solicitation until, at the earliest, the end of this year, and, possibly, not until next year, because SCE cannot be required to solicit until 90 days after it becomes creditworthy. Further, it is uncertain as to whether SCE could duplicate these pricing terms at a later date, given that the market price for power has gone up significantly since this contract was selected.

The reason for lead time in project development is that the Commission must approve the site transfer via an 851 application and some permitting and other development time will be required after the 851 approval. If the Commission had approved the contract when SCE originally sought approval, at the end of January 2003, the 851 application process could be underway. Thus, one reason for the delayed on-line date is the Commission's own inaction, for which our ratepayers should not be penalized.

Should the Commission approve site transfer at a later date, site decommissioning costs maybe delayed or deferred for PG&E, a benefit to its ratepayers. Although CUE contends that the site would be better developed as a PG&E plant, PG&E has no plans to develop the site as a power plant.

Discussion of Comments Received From April 7th Comment Period

The draft Kennedy Alternate (Agenda Item ID 2045) was circulated for comment on Monday, April 7, 2003 at about 5:00 PM for an approximately seven-day comment period. A public, redacted copy was circulated to the Rulemaking (R.) 01-10-024 service list, while a confidential, unredacted copy was circulated to the SCE PRG. Comments were due back via email to the Energy Division by 9:00 AM on Monday April 14, 2003. Each distribution was advised that this is an ample comment period and we see no reason to grant any requested extensions. Confidential comments were submitted by TURN, ORA, CUE, and SCE. Only one set of comments were received from the circulation to the R.01-10-024 service list. Those comments were from the California Biomass Energy Alliance (CBEA). The CBEA comments can be fairly summarized as quoted here:

"CBEA does not oppose the approval of the PPA. However, CBEA is concerned about the language in the resolution which provides that the power from the PA will count towards SCE's 1% interim requirement. Draft Res. E-3816 at 10. CBEA does not have access to

information regarding the type of power that will be procured under the PPA. If, however, the PPA is for geothermal energy, then the power should be certified as incremental by the California Energy Commission ("CEC") before it can be counted toward the 1% interim requirement, as is required for the geothermal power procured by Pacific Gas and Electric Company ("PG&E") (CBEA Comments, page 1).

We address CBEA's concerns by simply stating that the proposed PPA is not for geothermal power. As we have already stated above, procurement pursuant to the PPA will be deemed part of SCE's baseline, and will be counted toward SCE's one percent purchase requirement under D.02-08-071 and D.02-10-062.

Aside from the CBEA comments, two issues were of central concern in the April 7th comment period: (1) the 2003 online requirement, and (2) the intended level of disclosure of confidential material by the Commission upon approval of this resolution. SCE is "strongly supportive" of the Kennedy alternate particularly with regard to the 2003 online requirement exemption, however, SCE "strongly opposes" the release of certain confidential information, and, instead "would encourage the Commission to release certain limited information" in a manner proposed by SCE. TURN supports the Kennedy alternate and urges its approval, including the modification of the 2003 online requirement set forth in D.02-08-071²¹ such that the NATM project would be allowed to come online after 2003.

ORA has supported the proposed NATM contract since it was filed and only offered one edit to note that ORA had recommended the approval of an additional contract not selected by SCE. CUE is the only commenter that does not support exempting the proposed NATM contract from the 2003 online requirement. CUE contends that approval of the NATM contract would lead to a waste of Commission and party resources, that the project cannot satisfy the requirements of the Executive Order, and thus NATM cannot buy the site from PG&E. In spite of its opposition, CUE also submitted several technical corrections which will improve the accuracy of the alternate. For more

²¹ "We also require that any contracts for new renewables projects ... come online and begin delivering electricity before the end of 2003" (D.02-08-071, page 33).

information regarding this requirement, see the "2003 Online Requirement" Discussion subsection of this resolution.

In its April 14th comments, SCE stated that it "strongly opposes" the release of certain confidential information as proposed in the Kennedy alternate, and, instead "would encourage the Commission to release certain limited information" in a manner proposed by SCE. SCE is concerned that the Kennedy alternate "appears to release price information and specific contract terms and conditions [i.e., PGC funding contract contingencies] contained in the [NATM] contract" (SCE April 14, 2003 Comments, page 3, footnote 7). SCE further states that, "it is unclear what highlighted information the [Kennedy alternate] would consider 'specific pricing information' which would remain under seal if the [Kennedy alternate] is voted out" (SCE April 14, 2003 Comments, Exhibit A -- "SCE Marked [Redlined] Version [of the Draft Kennedy Alternate]", page 2, last paragraph, text in bold). TURN also stated in its comments that the Kennedy alternate is "not entirely clear with respect to whether specific pricing data for the NATM contract would remain redacted" (TURN Comments, page 1-2).

With regard to what text is actually regarded as "specific pricing information," SCE's and TURN's points are well-taken. Accordingly, this revised draft of the Kennedy alternate clearly designates all text which is considered "specific pricing information."

With regard to the NATM contract and the Kennedy alternate's proposed release of some confidential information, SCE proposes that the Commission be guided by a recent SCE/TURN agreement on confidentiality which was negotiated as part of the implementation of Renewable Procurement Standards (RPS) legislation in R. 01-10-024. The SCE/TURN agreement states disclosed information "should only be revealed *after* a decision approving or rejecting the PPA becomes final ("Final Commission Action"), i.e., only *after* a Commission decision approving or rejecting the PPA is no longer subject to rehearing or appeal" (SCE April 14, 2003 Comments, page 3, para.1).

SCE acknowledges that SCE/TURN agreement on confidentiality "applies only to the future solicitation of renewable PPAs via the RPS implementation process" (SCE April 14, 2003 Comments, page 2, footnote 6)²², however, SCE encourages

²² SCE April 14, 2003 Comments, page 2, footnote 6 in its entirety: "The TURN/SCE agreement in principle on confidentiality issues is set forth in SCE's Testimony on RPS

the Commission to apply that standard of disclosure in the NATM case. In contrast, TURN's April 14, 2003 comments on the Kennedy alternate made no mention of the SCE/TURN agreement on confidentiality, and is thus silent on whether the Commission should apply this standard of disclosure to the proposed NATM interim procurement contract.

It should be noted that confidentiality issues and effective public participation are actively being explored in R.01-10-024. On April 4, 2003, a joint Administrative Law Judge (ALJ) Ruling was issued "Regarding Confidentiality of Information and Effective Public Participation." With regard to resource data for renewables, specifically, the issue of "[a]ggregate data relating to renewable energy supplies, including summary of PPA information," the ruling stated that:

"The Joint Parties agree that this issue should be addressed in the renewables phase of this proceeding. All parties should have the opportunity to address the confidentiality issues associated with renewables in their March 27 testimony, and the confidentiality issues should be addressed after the filing of that material." (April 4, 2003 Joint ALJ Ruling in R.01-10-024, page 11)

Because the proposal of the NATM contract predates the SCE/TURN agreement on confidentiality, and for other reasons already stated, (1) we will not apply the SCE/TURN agreement standard on confidentiality to the NATM contract because the SCE/TURN agreement was entered into by both parties regarding

Issues in R.01-10-024, filed April 1, 2003 ("SCE RPS Testimony"), Section V at pages 30-32. Copies of these pages are attached hereto at Exhibit C. SCE notes that the agreement in principle with TURN applies only to the future solicitation of renewable PPAs via the RPS implementation process. However, in SCE's view, the principles of that agreement should apply equally to PPAs solicited in interim procurement. Indeed, because, as the [Kennedy alternate] recognizes, interim procurement is essentially a one-time event, the results of which will not necessarily be indicative of future Commission policy, to the extent that disclosure is justified by a desire to publicly articulate the formulation of on-going Commission policy, there is even *less* reason to make disclosures in the interim process than there will be when RPS is being implemented. *See* [Kennedy alternate] at 2 ("we will adopt broadly applicable standards governing confidentiality elsewhere")."

future solicitations, not for interim procurement contracts, and (2) we will not disclose any specific pricing information as now clearly marked in this resolution as [[[underlined in triple brackets]]].

Discussion of Comments Received From April 30th Comment Period

The second draft Kennedy Alternate (Agenda Item ID 2163) was circulated for comment on Wednesday, April 30, 2003 at about 3:30 PM for an approximately four-day comment period. A public, redacted copy was circulated to the Rulemaking (R.) 01-10-024 service list, while a confidential, unredacted copy was circulated to the SCE PRG. Comments were due back via email to the Energy Division by 9:00 AM on Monday May 5, 2003. Each distribution was advised that this was an ample comment period and that no extensions would be granted and none were received. Comments were filed by TURN and SCE.

TURN only submitted a short email response that stated: "TURN supports the second alternate resolution of Commissioner Kennedy for the reasons articulated in previously submitted comments." In its comments, SCE supports the second Kennedy Alternate to E-3816 (Agenda Item ID 2163), along with the associated draft decision (Agenda Item ID 2156) modifying the 2003 online requirement set forth in D.02-08-071, upon a showing of good cause. In its comments on the draft resolution, SCE would add the following language to the end of the "2003 Online Requirement" section of the resolution, at about page 12: "In addition, the Commission's has [sic] delayed approving the PPA which action is an additional factor in the failure of the PPA to meet a 2003 online date." The proposed edit was modified to read: "In addition, the Commission has held the proposed PPA submitted in SCE AL 1676-E for further review and consideration. This action has further contributed to NAPG's anticipated failure to meet a 2003 online date." As before, SCE opposes the release of confidential material, upon Commission vote, as set forth in this resolution.

Conclusions Regarding Comment Period Waiver and Reduction

Commission Rule 77.7 implements provisions of Public Utilities Code Section 311(g) for public review and comment by parties on Commission

decisions and alternates. In the interest of public necessity²³ as set forth in Rule 77.7(f)(9), the Commission may reduce or waive the 30-day period for public review and comment for draft decisions (and resolutions) and may reduce, but not waive, the public review and comment period for alternates.

With respect to a resolution disposing of an advice letter, Rule 77.7(a)(6) states that a "Party" includes (1) the advice letter filer, (2) anyone filing a protest or response to the advice letter, and (3) any third party whose name and interest in the relief sought appears on the face of the advice letter (as where the advice letter seeks approval of a contract or deviation for the benefit of such third party).

We have balanced the public interest in avoiding the possible harm to public welfare flowing from delay in considering the Resolution against the public interest in having the full 30-day period for review and comment, and have concluded that the former outweighs the latter. Failure to adopt this resolution before the expiration of the 30-day review and comment period would cause significant harm to the public welfare. In this case, public necessity requires the reduction of the 30-day comment period in order to secure the potential benefits of the proposed interim procurement contracts to SCE customers. Thus, the 30-day comment period for the second Kennedy Alternate to E-3816 (Agenda ID 2163) was reduced to (1) an approximately four-day public review and comment period with email notice to the R.01-10-024 service list, and (2) an approximately four-day confidential PRG review, due to public necessity.

In sum, draft resolutions addressing the proposed PPA were circulated for review and comment as follows:

- one PRG comment period of one-day on E-3809;

²³ "Public necessity" includes, without limitation, circumstances where failure to adopt a decision before expiration of the 30-day review and comment period would place the Commission or a Commission regulatee in violation of applicable law, or where such failure would cause significant harm to public health or welfare. When acting pursuant to this subsection, the Commission will provide such reduced period for public review and comment as is consistent with the public necessity requiring reduction or waiver. Rule 77.7(f)(9), in part.

- one three-day PRG comment period on E-3816 (Agenda ID 1771) and on the E-3816 Wood Alternate (Agenda ID 1844);
- one approximately seven-day public review and comment period during which a redacted copy of the First Kennedy Alternate to E-3816 (Agenda ID 2045) was circulated to the R.01-10-024 service list (which included all protestants to SCE AL 1676-E) while an unredacted copy was circulated to the PRG; and
- the Second Kennedy Alternate to E-3816 (Agenda ID 2163) was circulated for an approximately four-day public review and comment period in the same manner as was done for the First Kennedy Alternate to E-3816.

FINDINGS

1. D.02-08-071 directed SCE, PG&E, and SDG&E to file an Advice Letter to seek pre-approval of any contract for transitional procurement, including contracts with renewables energy resources.
2. DWR credit support is not required the counterparty to the PPA proposed by SCE in AL 1676-E.
3. The PRG for SCE comprises the California Energy Commission (CEC), California Utility Employees (CUE), Department of Water Resources (DWR), Energy Division, Office of Ratepayer Advocates (ORA), Natural Resources Defense Council (NRDC), and The Utility Reform Network (TURN).
4. SCE filed AL 1676-E on December 24, 2002 requesting approval of five power purchase agreements (PPAs) contributing toward procurement of at least an additional one percent of the utility's annual electricity sales from renewable energy resources irrespective of utility residual net short.
5. On January 30, 2003, the Commission issued Resolution E-3809 which approved four of the five PPAs submitted in SCE AL 1676-E, deferring consideration of the North American contract to a later meeting, which is now the subject of this resolution, E-3816.
6. AL 1676-E was confidentially protested by ORA, TURN, CUE, and the CEC, and publicly protested by Ridgewood, and CalWEA on January 6, 2003.

7. SCE submitted a confidential response to the protests of ORA, TURN, CUE, and the CEC on January 9, 2003, and on January 10, 2003, SCE submitted a revised confidential Appendix A to its January 9, 2003 response in order to correct several non-substantive typographical errors.
8. SCE complied with the following requirements of D.02-08-071:
 - (a) "Each IOU hold a separate competitive solicitation for renewable resources in the amount of at least an additional 1 percent of their annual electricity sold beginning January 1, 2003.
 - (b) "Utilities should solicit bids for electricity to be delivered beginning January 1, 2003, and extending for five, ten, and 15 year terms, with no contract shorter than five years.
 - (c) "Utilities should enter into contracts with a mixture of term lengths.
 - (d) "During the solicitation process, utilities should give a preference to existing renewable resources in the bidding process if their bids are equal to or lower than prices offered by new projects.
 - (e) "This requirement for a 1 percent increase in renewable resources is irrespective of the residual net short, though we encourage the utilities to solicit bids from innovative renewables projects that can help meet the utilities' residual net short requirements.
 - (f) "We also require that bids to provide renewable power clearly identify any expected funds from the public goods charge (PGC) administered by the CEC that are included in the resource pricing.
 - (g) "During the transitional period, any contract that meets or exceeds the 5.37 cents per kWh benchmark will be deemed *per se* reasonable, though other contracts at prices above the benchmark may also be approved by the Commission for cost recovery through the process outlined in this decision."
9. The PPA and SCE's entry into the PPA are reasonable and prudent for all purposes, including, but not limited to, recovery of all payments made pursuant to the PPA in rates, subject only to review with respect to the reasonableness of SCE's administration of the PPA.
10. SCE's solicitation of renewable power that resulted in the PPA has been conducted reasonably for purposes of this interim procurement, although we order several changes to the terms of the PPA and reiterate our position that RPS rules will be developed in due course.

11. As proposed, the contract termination clauses could result in contracts shorter than five years which is inconsistent with our directives on this point; therefore, we direct SCE to remove the contract termination clauses from the proposed PPA that tie contract termination rights to PGC funding.
12. We direct SCE to remove the PGC funding requirements from the proposed PPA, in order to allow the CEC to make a more objective PGC funding determination.
13. SCE made a sufficient showing that proposed PPA is in the ratepayers' interest because it further contributes toward SCE's obligation to procure renewable resources at a negligible premium relative to the provisional benchmark price provided in D.02-08-071.
14. Any procurement pursuant to the PPA is deemed part of SCE's "baseline" quantity of eligible renewable resources for purposes of Section 399.15 of the Public Utilities Code or other applicable law.
15. Any procurement pursuant to the PPA is deemed transitional procurement by SCE from a renewable resource for purposes of determining SCE's compliance with any obligation that it may have pursuant to D.02-08-071 and D. 02-10-062, or other applicable law, to procure an additional 1% of its annual electricity sales from renewable resources.
16. On May 8, 2003, the Commission issued D.03-05-035 which modified D.02-08-071 "to allow for a departure from the requirement that new renewable resources procured by the three respondent utilities through a set-aside during the transitional period process be required to come online and begin delivering electricity before the end of 2003, upon a showing of good cause."
17. D.03-05-035 set forth the following criteria relevant to a showing of good cause determination which, we determine, has been met by the proposed PPA:
 - a. The proposed PPA resulted from an open and competitive bid solicitation that notified all bidders that proposals would be considered for renewable energy projects that did not meet the 2003 online requirement set forth in D.02-08-071.

- b. The proposed PPA does contain reasonable prices and terms, provides for reliable renewable power, and does not displace any comparable bidders.
 - c. Commission action and inaction was a factor in the failure of the PPA to meet the 2003 online date, causing a delay in the project.
18. Neither SCE nor NAPG have submitted to us any cost of service data concerning the Kern Power Plant, and approving the contract between NAPG's affiliate and SCE should in no way be taken as a determination that the contract is a "cost-of-service" based contract for purposes of Executive Order D-44-01, nor as a determination that any of the other requirements of the Executive Order have been satisfied.
19. We do not establish a routine practice or new methodology in this resolution, as the approval of this contract is not indicative of approval of any contracts to be submitted in the future.
20. The confidential material being made public pursuant to this resolution was not disclosed in the redacted agenda resolution provided for public review on the Escutia table prior to the May 8, 2003 meeting. All text in this resolution, except for specific pricing information which **[[[underlined in triple brackets]]]** (including PGC funding amounts), which appears in this light blue highlight in the unredacted electronic copy, in gray highlight in the unredacted hardcopy, or which is marked "[REDACTED]" in the redacted copy, should be made public upon Commission approval of this resolution.
21. We should approve the North American contract submitted in AL 1676-E, as modified, effective today.

THEREFORE IT IS ORDERED THAT:

- 1. SCE's request to enter into the North American contract contributing toward procurement of at least an additional one percent of its annual electricity sales from renewable energy resources, in Advice Letter 1676-E, is approved as modified.
- 2. All text in this resolution, except for specific pricing information which **[[[underlined in triple brackets]]]** (including PGC funding amounts), which

appears in this light blue highlight in the unredacted electronic copy, in gray highlight in the unredacted hardcopy, or which is marked "[REDACTED]" in the redacted copy, should be made public upon Commission approval of this resolution, as allowed under Public Utilities Code Section 583.

3. This Resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed and adopted at a conference of the Public Utilities Commission of the State of California held on May 8, 2003; the following Commissioners voting favorably thereon:

WILLIAM AHERN
Executive Director

MICHAEL R. PEEVEY
President
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

I dissent
/s/ CARL W. WOOD
Commissioner